# Supreme Court of the United States.

No. 73.—October Term, 1905.

The Otis Company, Plaintiff in Error, vs. The Ludlow Manufacturing Company and The Ludlow Cordage Company. } In Error to the Superior Court of the State of Massachusetts.

[March 12, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity to restrain the defendants in error from flooding the plaintiff's land by means of a dam erected under the Massachusetts Mill Act. The injunction is asked on alternative grounds—either that the Mill Act does not authorize the dam, or that, if it does, then it is contrary to the Fourteenth Amendment of the Constitution of the United States. The case was tried in the Superior Court and reported to the Supreme Judicial Court, which held that the statute authorized the dam and was valid, and ordered the bill be dismissed. 186 Mass. 89. A decree was entered in accordance with the rescript and the case then was brought here. The claim under the Constitution was distinctly set up in the bill, and was insisted on at every stage. The Court could not have decided as it did without overruling that claim, so that the jurisdiction of this Court is clear, although it was denied.

The dam in question is built across the Chicopee River, a non-navigable stream, at Red Bridge. It was begun, in pursuance of a long previous determination, on August 3, 1899, and was completed within a reasonable time. The plaintiff owned a mill and dam, more than two miles above, and land below its dam on the two sides of the watercourse, down to within about two miles from the principal defendant's dam. On April 4, 1900, the plaintiff determined to build a dam near its lower boundary, and began the work of construction on August 11 of the same year. This dam was completed before, although it was begun after, the defendants', and will be rendered nearly or wholly useless by the back flow from the defendants' structure. The plaintiff's original dam and mill will not be interfered with. The Supreme Judicial Court decided that under the statute then in force, Pub. Sts. c. 190, § 2, the principal defendant, herein called the defendant, acquired the prior right, and that the statute was

constitutional. It postponed the consideration of the plaintiff's rights in reference to damages, but decided that the provision for compensation was adequate to satisfy whatever rights the plaintiff might have.

The only question which it is necessary for us to consider is whether the act as construed violates the Fourteenth Amendment.—General objections to Mill Acts as taking property for private use or on other grounds have been disposed of by *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9. See further, *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.* [Feb. 19, 1906.] Such acts have been in force in Massachusetts ever since an act of 1714, c. 15. 1 Prov. Laws, 729. The practice sanctioned by them would seem from the recitals of that act to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watchings and wardings one miller to each grist mill; Act of 1693, c. 3, § 13; 1 Prov. Laws, 130; and in the public duties which were expressed in the Act of 1728, c. 6, § 3. 1 Prov. Laws, 497. But at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams as there understood.

However, the liability of upper land to be flowed is not a liability to be flowed without payment. The principal objection made to the law is that it makes no adequate provision for payment, if it is construed as it has been construed by the State Court. There has been no substantial change in the form of this provision for the better part of a century. It reads: "A person whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint." Pub. Sts. c. 190, § 4. The jury is to take into consideration damage to other land as well as the damage to the land overflowed. § 14. It is to assess the damages sustained within three years, § 16, and to determine what sum, to be paid annually, would be reasonable compensation for the damages that may be occasioned thereafter, and also a sum in gross for all damages from the use of the dam in the manner fixed by it, § 18, the jury having power to regulate the height of the dam. § 17. The complainant is given an election to take the gross sum, in which case the owner of the dam loses all benefit of the act after three months until he pays. §§ 19, 20. Otherwise the complainant has an action for the annual compensation and a lien on the dam and lands used with it. §§ 21 *et seq.* And, finally, if dissatisfied with the amount of the annual compensation, he may bring a new complaint. § 30.

In considering whether these provisions are sufficient it is important to know exactly what the upper owner loses by the dam. The State Court lays it down that there is no taking under the right of eminent domain. 186 Mass. 95. We assume this to mean what often has been said with regard to the Mill Acts, that under them no easement or title of any kind is gained in or over the upper land, and that the water could be diked out, *Storm* v. *Manchaug Co.*, 13 All. 10, 13; *Lowell* v. *Boston*, 111 Mass. 454, 466; although the language has not been uniform and it seems to have been held otherwise when the damages are paid in gross. *Isele* v. *Arlington Five Cents Savings Bank*, 135 Mass. 142. Taking the law to be as stated by the Court, it would follow that only the damage physically suffered is to be paid for. When a title is taken, for instance, to the waters of a stream, it is held that the whole value of the title must be paid, although a considerable use may be left in fact to the party aggrieved. *Howe* v. *Weymouth*, 148 Mass. 605; *Imbescheid* v. *Old Colony Railroad Co.*, 171 Mass. 209. Flowage under the Mill Acts seems to be regarded as presenting the converse case. As no title is gained to have the water on the upper land, the dam owner pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified than could be sustained when the title is lost. So far as security goes, looking to the reasonable probabilities in such cases, it would seem to be sufficient. We must bear in mind, as we presume the State Court meant to suggest by its citation of the case of *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, [397,] that, as was said there in words that need but little change, if other remedies proved ineffectual, the "Court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam." In other words, the right to an injunction, if necessary, is taken into account in Massachusetts, in deciding whether the security for payment is sufficient, even when there is a taking by eminent domain. See also *Attorney General* v. *Old Colony Railroad*, 160 Mass. 62, 90. *Manigault* v. *Springs*, 199 U. S. 473, 485, 486. This seems an answer to the objection that in the state of the business of the courts a judgment for past damages may not be recorded for several years, that the defendant may be insolvent, the dam inadequate security, and valuable improvements destroyed. It is said that the lower owner might abandon his dam and thereby escape liability for gross damages after an election to take them. But we presume that in that case he would be held to pay the temporary damage caused and the case would stand like one where the choice had been the other way. *Hunt* v. *Whitney*, 4 Met. 603, 608.

Again, we cannot wholly neglect the long settled law and common understanding of a particular State in considering the plaintiff's rights. We are

bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a State. *Eldridge* v. *Trezevant*, 160 U. S. 452, 466. For a century the remedy given by the statute has been supposed to be sufficient, and in 1832 it was decided to be so under a somewhat similar statute which was held to create a servitude. *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467. We are not prepared to pronounce the statute void on the ground that the security for payment is not enough.

But is argued that not all the serious damage which is or may be suffered is compensated. It is said that only damages caused by flowing can be recovered. But the cases cited only show that damages regarded as too remote on general principles are disallowed, *Fuller* v. *Chicopee Manufacturing Co.*, 16 Gray, 46, or that not being within the protection of the Mill Acts they are to be recovered by an action at common law. *Eames* v. *New England Worsted Co.*, 11 Met. 570. And the statute now expressly provides for a "person whose land is overflowed or otherwise injured," § 4, and that the jury shall take into consideration any damage occasioned to other land as well as that to the land overflowed. § 14. A graver doubt is raised by another argument. It is decided that the prior right is gained by the dam first begun, provided it is completed and put in operation within a reasonable time. If, as in the present case, the upper owner builds a dam in the meantime, it may be held that he is entitled to no compensation for its being rendered useless, even if he builds without notice of the earlier appropriation, as well might happen. On the other hand if he refrains from using his land as he desires, he may be denied compensation for being deprived of the use of his land. We do not perceive why the latter result should follow. As to the former it may be held that, notwithstanding the priority of the lower owner, the upper owner has a right to improve his land until it actually is flowed. Otherwise the former might have it in his power to keep the latter in suspense for a year or two and then abandon his dam. Because the plaintiff was too late to prohibit the defendant's dam it does not follow that it may not be entitled to all the damages which it suffers when the flowing takes place. That it would be entitled to them perhaps may be inferred from *Baird* v. *Wells*, 22 Pick. 312, decided under a different statute but still applicable so far as this principle is concerned. See further *Storm* v. *Manchaug Co.*, 13 Allen, 10, 15; *Edwards* v. *Bruorton*, 184 Mass. 529, 532.

The State Court has confined itself to a general declaration that the act is valid and has not expressed itself definitely upon these points. Yet our opinion upon the constitutional question may depend upon its interpreta-

tation of the statute in a case which could not be brought here. Obviously it would be unjust that the plaintiff should be concluded upon a doubtful construction assumed by us which the State Court hereafter may not adopt. Therefore it seems to us proper that this bill should be dismissed without prejudice, or retained until the plaintiff's rights shall have been determined in the proceedings for damages under the statutes, which it is admitted have been brought. The objection to the act on the ground of want of notice does not impress us except in its bearing upon the point just mentioned. The right of the lower owner only becomes complete when the land is flowed, and, as, even then, it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam subject to paying for the harm actually done, we see nothing to complain of in that regard.

*Decree modified and affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*